

13-317

United States of America v. Johnny Nunez Garcia

MANDATE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of October, two thousand fourteen.

PRESENT: AMALYA L. KEARSE,
CHESTER J. STRAUB,
RICHARD C. WESLEY,
Circuit Judges.

**USDC SDNY
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DATE FILED: November 26, 2014**

UNITED STATES OF AMERICA,

Appellee,

-v.-

No. 13-317

JOHNNY NUNEZ GARCIA, AKA SUPERIOR, AKA SUPREME,

Defendant-Appellant,

JAVIER LOPEZ, AKA TWIN, DANIEL FELIZ, AKA NO NAME, HEMPHILL
GARCIA, AKA POTATO FACE, JUNUEL ALVAREZ, KEVIN VASQUEZ, AKA

KAKAITO, CARLOS CARRERA, AKA MEXICO, OLIVER BELOZ, AKA
SHORTY, ERIC ARAUJO,

Defendants.

For Appellant: JULIA PAMELA HEIT, New York, NY.

For Appellee: MICHAEL FERRARA, Assistant United States Attorney
(Ryan P. Poscablo, Michael A. Levy, *on the brief*), for
Preet Bharara, United States Attorney for the Southern
District of New York, New York, NY.

Appeal from the United States District Court for the Southern District of
New York (Griesa, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
ADJUDGED AND DECREED that the judgment is **AFFIRMED** in part and
REMANDED in part.

Johnny Nunez Garcia appeals from a judgment of conviction dated
January 11, 2013 sentencing him to a total term of 240 months' imprisonment to
be followed by five years of supervised release and imposing a \$200 mandatory
special assessment.

In a Superseding Indictment filed on December 21, 2011, Garcia was
charged with (1) conspiracy to distribute and possess with intent to distribute at
least 280 grams of cocaine base (in the form of crack) in violation of 21 U.S.C.

§§ 846, 841(b)(1)(A) (Count One) and (2) knowingly using and carrying firearms in furtherance of the conspiracy charged in Count One, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count Two). Garcia was convicted on both counts. At the urging of the government, the jury was not asked to make any finding as to whether the firearm “used and carried” was, in fact, discharged. Instead, the court itself made the finding as to discharge and, pursuant to that finding, the district court imposed what it believed to be the mandatory minimum prison term of 120 months for each count, to be served consecutively.

Among the several challenges that Garcia brings on appeal, he argues that the Supreme Court’s decision in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), requires that this Court remand for resentencing. The government concedes this argument, and we agree. Accordingly, we instruct the district court to vacate and resentence, with a mandatory minimum sentence on Count Two of five years’ imprisonment, *see* 18 U.S.C. § 924(c)(1)(A)(i), in keeping with the jury’s factual findings that Garcia used and carried a firearm in furtherance of the conspiracy.

We decline to address Garcia's argument that he was deprived of effective assistance of counsel at sentencing. The opportunity for resentencing renders that argument moot.

We have considered Garcia's remaining arguments and find them to be without merit. For the reasons stated above, the judgment of the district court is **AFFIRMED** in part and **REMANDED** in part.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


